No. 13-1438

In the
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

STATE OF MICHIGAN,
Plaintiff-Appellee,
v.
THE SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS,
Defendant-Appellant.

Appeal from the United States District Court
Western District of Michigan, Southern Division
Honorable Robert J. Jonker

STATE OF MICHIGAN'S
MOTION TO STAY ISSUANCE OF MANDATE

The State of Michigan, by its attorneys, Bill Schuette, Attorney General for the State of Michigan, Aaron D. Lindstrom, Solicitor General, Louis B. Reinwasser, and Kelly M. Drake, respectfully asks this Court to stay the issuance of the mandate of its December 18, 2013 decision, so that the State may file a petition in the U. S. Supreme Court for a writ of certiorari. *See* Fed. R. App. P. 41. This Court's decision reversed the district court's issuance of a preliminary injunction prohibiting the tribal defendant from applying to have land in Lansing, Michigan taken into trust for the purpose of casino gaming.

INTRODUCTION

The Supreme Court will soon rule in *Michigan v. Bay Mills* (No. 12-515) on the scope of tribal immunity, as the matter was argued in December of last year. In the decision below for the Sault Ste. Marie Tribe, this Court based its opinion on its view of tribal immunity, which in turn was based on its earlier decision in *Bay Mills v. Michigan,* 695 F.3d 406 (6th Cir. 2012). Therefore, it is reasonable to believe the Supreme Court will grant the State's petition for certiorari here—or at a minimum hold the case—so the status quo is maintained while the Supreme Court decides the scope of tribal immunity.

Further, the Supreme Court may also grant the State's petition to resolve the same federal circuit court split that likely led it to grant certiorari in the *Bay Mills* case, and to clarify the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq*. In this present case, as in *Bay Mills*, this Court has denied the State a remedy for a blatant breach of a tribe's IGRA-authorized tribal-state gaming compact, based on this Court's broad reading of tribal immunity. The State faces significant consequences if it cannot obtain a timely remedy for the type of compact violation at issue in this case. If this Court's decision remains, the

Tribe here will be free to apply to have land taken into trust for gaming virtually *anywhere* in the State, in direct violation of the provision in its gaming compact that was designed exactly to limit this type of free-for-all off-reservation gaming. This will effectively render the gaming compacts meaningless, a result that the Supreme Court will likely find worthy of further review.

These are difficult, yet extremely consequential issues; they deserve consideration at the highest level. Even if the Supreme Court does not resolve the tribal immunity questions in *Bay Mills* (which the justices gave every indication at oral argument that they would), the questions in this case remain worthy of certiorari on the issue of State sovereignty and the obligations of the Tribes under a compact. And if, on the other hand, the Court does resolve the tribal immunity questions in *Bay Mills*, the Court would likely grant the State's petition in this case, vacate this Court's decision, and remand for reconsideration in light of its new guidance. So either way, there is a reasonable probability that certiorari will be granted. The State thus respectfully requests that the mandate be stayed to maintain the status quo while this occurs.

STATEMENT OF FACTS

In 1993, the State and Tribe entered into a tribal-state gaming compact pursuant to the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq*. (Compact, RE 1-1, Page ID # 19.) Consistent with IGRA, the Compact generally establishes the rights and responsibilities of the parties concerning the operation of casino gaming by the Tribe in Michigan. Under the Compact, the Tribe has conducted gaming in five casinos it operates on Indian lands in Michigan's Upper Peninsula, where its reservation is located. (Opinion, RE 37, Page ID # 843–44.)

In § 9 of the Compact, the Tribe expressly promised not to submit an application to take off-reservation land into trust for gaming purposes unless it first executed a revenue-sharing agreement with the other Michigan tribes:

> **Off-Reservation Gaming.** An application to take land in trust for gaming purposes pursuant to § 20 of IGRA (25 U.S.C. § 2719) shall not be submitted to the Secretary of the Interior in the absence of a prior written agreement between the Tribe and the State's other federally recognized Indian Tribes that provides for each of the other Tribes to share in the revenue of the off-reservation gaming facility that is the subject of the § 20 application. [Compact, RE 1-1, Page ID # 30.]

In January 2012, the Tribe announced its intent to take land into trust without securing a revenue-sharing agreement. It adopted Resolution 2012-11, which stated that the Tribe intended to open a casino in the City of Lansing on land that is not part of the Tribe's reservation—land, in fact, more than 200 miles from the Tribe's reservation. After the State learned of the proposed Lansing casino through media reports and realized the Tribe had not entered into a revenue-sharing agreement with the other Michigan tribes, it warned the Tribe that this plan violated the Compact. When the Tribe ignored the warnings, the State filed the instant lawsuit. The State also filed a motion to preliminarily enjoin the Tribe from applying to take land into trust, because that application would violate the Compact. (Panel Decision, attached as Exhibit A.)

While the district court granted the preliminary injunction of the Tribe's plan to violate the Compact, this Court reversed, concluding that the Tribe was immune from suit concerning its violation of the Compact. This Court also denied the State's petition for rehearing.

ARGUMENT FOR STAY OF MANDATE

I. The Court should stay the mandate because the Supreme Court is likely to grant the State's petition for writ of certiorari and the State will suffer irreparable injury if a stay isn't issued.

A. There is a reasonable probability that the Supreme Court will grant the State's petition for writ of certiorari.

1. *Bay Mills* could resolve this case.

The Justices' questions at oral argument in *Bay Mills* make it clear that the Supreme Court is considering modifying tribal immunity itself so it doesn't protect tribal actions taken in commercial settings, such as casino gaming. For example, Justice Kennedy said that "maybe this whole idea of immunity doesn't work very well in the context of gaming." (Exhibit B at 47–48.) Justice Ginsburg expressed similar questions about the scope of tribal immunity, "Why couldn't the Court . . . say, [just as] it makes sense in the foreign country context, it also makes sense in the context of the tribes, to distinguish commercial from governmental?" (*Id.* at 59.)

These quotes directly reflect the relief sought in the State's merits brief in *Bay Mills*—that tribal immunity for commercial activities be modified. (*See* Brief for Petitioner, attached as Exhibit C, at 41.) If the

Supreme Court abolishes tribal immunity for commercial actions, or at least actions concerning tribal gaming, it would resolve this appeal. It is reasonable to believe that if the Supreme Court has not decided *Bay Mills* by the time the State files its petition for writ of certiorari in this case, the Court will grant the petition so it can resolve both cases at the same time, e.g., vacating the judgment here and remanding for a decision consistent with its decision in *Bay Mills*.

It is also reasonable to believe that the Supreme Court would grant a motion to stay the current case, if necessary, to maintain the status quo while it decides the scope of tribal immunity, whether in the context of this case or *Bay Mills*. This Court should therefore stay issuance of its mandate pending further decision by the Supreme Court so the State is not forced to file a motion for stay in that Court as well.

2. The petition for writ of certiorari is likely to be granted to resolve a split in the circuits.

This case implicates the same circuit split that likely led the Supreme Court to grant certiorari in *Bay Mills*. The instant case may well have come out differently in the Ninth, Tenth, or Eleventh Circuits, where the courts have held that "IGRA waived tribal sovereign

immunity in the narrow category of cases where compliance with IGRA's provisions is at issue and where only declaratory or injunctive relief is sought." *Mescalero Apache Tribe v. State of N.M.*, 131 F.3d 1379, 1385 (10th Cir. 1997); *accord Lewis v. Norton*, 424 F.3d 959, 962–63 (9th Cir. 2005) ("IGRA waives tribal sovereign immunity in the narrow category of cases where compliance with the IGRA is at issue."); *Florida v. Seminole Tribe of Florida*, 181 F.3d 1237, 1242 (11th Cir. 1999) ("Congress abrogated tribal immunity only in the narrow circumstance in which a tribe conducts class III gaming in violation of an existing Tribal–State compact."). The State's claim falls comfortably within the scope of those rulings, as this case involves violations of both IGRA and the Sault Tribe's existing compact.

3. The petition for writ of certiorari is likely to be granted to clarify what "gaming activities" may be enjoined under IGRA.

The panel concluded that enjoining a tribe from applying to have land taken into trust *for gaming purposes* is not enjoining a "gaming activity" as that term is used in 25 U.S.C. § 2710(d)(7)(A)(ii), and that the Tribe's immunity was therefore not abrogated by IGRA. The panel decision asserts, with little explanation, that a Michigan Indian Land

Claims Settlement Act trust application is not a gaming activity, suggesting that the source of the government's trust-taking authority somehow makes a difference to the question of whether such an application is gaming activity. But whether that authority is the Settlement Act or the more typical grant in the Indian Reorganization Act, 25 U.S.C. § 465, it is irrelevant to the question of whether such trust taking is a gaming activity under IGRA.[1]

What is relevant is the *purpose* for which the land will be used, and there is no dispute that the sole purpose here is for gaming. Obtaining a prerequisite trust status for the land is every bit as much a "gaming activity" as maintaining or licensing a casino building. The latter is explicitly blessed by IGRA as an appropriate subject for a gaming compact, 25 U.S.C. § 2710(d)(3)(C)(vi), and actions alleging violations of compact provisions concerning maintenance and licensing of a gaming facility abrogate tribal immunity, *see Wisconsin v. Ho-Chunk*, 512 F.3d 921, 933–34 (7th Cir. 2008). Because there is no practical difference between a compact provision requiring licensing standards for a casino and a provision imposing standards for seeking

[1] There is no dispute that IGRA itself does not grant authority to the federal government to take land into trust for tribes.

trust status for the property on which the casino sits, it is reasonable to conclude that Congress intended to abrogate tribal immunity for violations of a compact provision that, like § 9, imposes preconditions on taking land into trust for gaming purposes. *See* 25 U.S.C. § 2710(d)(3)(C)(vii) (concerning subjects related to gaming).

Moreover, denying the enforcement of a provision like § 9 needlessly restricts the options available to states *and tribes* for controlling the expansion of off-reservation gaming. The court should encourage the parties to regulate such gaming in the manner they see fit; after all, IGRA ensconced gaming compacts as the mechanism for tribes and states to regulate tribal gaming. Ignoring the parties' express intentions here based on an unnecessarily cramped IGRA interpretation defeats that purpose.

B. The State will be irreparably harmed if the Tribe can ignore its compact promises with impunity.

The trial court determined that allowing the Tribe to apply to have land taken into trust likely violated § 9 of the compact and, accordingly, entered a preliminary injunction. (Exhibit A at 4–5.) The panel did not disagree with this conclusion, but held that the State

would not be injured by the compact violation because it could bring a new action sometime later to obtain a remedy. But where the tribal-state compact is the state's primary mechanism to regulate tribal gaming within its borders, the inability to obtain an injunction prohibiting an imminent compact violation is an irreparable debilitation of the state's authority to regulate.

The Eighth Circuit Court of Appeals, in a similar situation, held that a tribe's refusal to comply with a federal agency order resulted in irreparable harm because it undermined the agency's regulatory authority: it agreed with the district court that "irreparable harm or the threat of irreparable harm existed in the form of 'a debilitation of the NIGC's [National Indian Gaming Commission's] regulatory role.'" *In re Sac & Fox Tribe of the Mississippi in Iowa/Meskwaki Casino Litig.*, 340 F.3d 749, 761 (8th Cir. 2003). This irreparable harm was a current, not prospective harm, because "[t]he Appointed Council, at all times prior to closure of the casino by the U.S. Marshals, ignored the authority of the NIGC Chairman. The Appointed Council's refusal to abide by the temporary closure order demonstrated an immediate 'debilitation of the NIGC's regulatory role.'" *Id.*

Similarly here, the Sault Tribe intends to ignore § 9 and apply to have land taken into trust. Since the State primarily regulates gaming-related conduct through the authority of the compact, it finds itself in the same position as the NIGC, which was looking to the federal court to affirm its authority. The tribe's refusal in *Sac & Fox* to abide by that authority was irreparable injury satisfying the injunction standard. This was true, even though the case was only at the preliminary injunction stage, and a later permanent remedy would have been available to the NIGC. The same logic applies with even more force to this case, given that here it is a sovereign state that is being deprived of its authority to regulate, and provides ample grounds for this Court to stay its mandate to protect the State's authority to regulate, particularly given the trial court's determination that the Tribe's announced course will violate the compact.

Likewise, the State will suffer irreparable injury because it will lose the benefit of the bargain it struck with the Tribe when § 9 was agreed to. If the Tribe is allowed to submit a trust application, the State will have to challenge the application and appeal if there is an adverse administrative ruling. Such a ruling could include a

determination of the enforceability of § 9 of the compact. The Tribe will then likely argue that any challenge by the State is subject to the stricter standard of review applicable to administrative rulings, which, if supportable, would put the State at a distinct disadvantage compared to the preponderance-of-the-evidence standard that pertains in the instant case. Maintaining the status quo until the Supreme Court clarifies the tribal immunity issues makes sense under these circumstances.

CONCLUSION

The State of Michigan respectfully requests that the Court issue a stay of the mandate pending the State's petition in the Supreme Court for a writ of certiorari.

Bill Schuette
Attorney General

/s/ Aaron D. Lindstrom
Solicitor General
Co-Counsel of Record
Attorneys for
Plaintiff-Appellee
P.O. Box 30212
Lansing, MI 48909
517-241-8403
LindstromA@michigan.gov

Louis B. Reinwasser
Kelly M. Drake
Assistant Attorneys General
Co-Counsel of Record
Attorneys for Plaintiff-Appellee
Environment, Natural Resources
and Agriculture Division
P.O. Box 30755
Lansing, MI 48909
(517) 373-7540

Dated: February 20, 2014

CERTIFICATE OF COMPLIANCE

Certificate of Compliance with Page Limitation, Typeface Requirements, and Type Style Requirements

1. This motion to stay issuance of mandate complies with the page limitation of Federal Rule of Appellate Procedure 27(d)(2) because the motion does not exceed 20 pages.

2. This motion complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this motion has been prepared in a proportionally spaced typeface using Word 2010 in 14 point Century Schoolbook.

/s/ Aaron D. Lindstrom
Solicitor General

Co-Counsel of Record
Attorneys for
Plaintiff-Appellee
P.O. Box 30212
Lansing, MI 48909
517-241-8403
LindstromA@michigan.gov

CERTIFICATE OF SERVICE

I certify that on February 20, 2014, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

/s/ Aaron D. Lindstrom
Solicitor General

Co-Counsel of Record
Attorneys for
Plaintiff-Appellee
P.O. Box 30212
Lansing, MI 48909
517-241-8403
LindstromA@michigan.gov